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## Discussion of Recent Decisions

W. J. Moore

R. K. Hoffman

A. Geller

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## DISCUSSION OF RECENT DECISIONS

CRIMINAL LAW—FORMER JEOPARDY—WHETHER WITHDRAWAL OF THE SUBMISSION AND FURTHER INTERROGATION OF A JUROR AS TO HIS QUALIFICATIONS CONSTITUTES A BAR TO SUBSEQUENT PROSECUTION WHEN THE SAME JUROR IS AGAIN IMPANELED AND SWORN—In the recent case of *Maddox v. State*,<sup>1</sup> the Supreme Court of Indiana was asked to adjudicate upon the validity of a plea of former jeopardy filed by the defendant after a juror, who had been re-interrogated as to his competency following a withdrawal of the submission of the cause to the jury, was re-impaneled

<sup>1</sup>—Ind.—, 102 N. E. (2d) 225 (1951). Draper, J., wrote a dissenting opinion.

and the jury again sworn. It appeared therein that, after the jury had been impaneled and sworn and the prosecuting attorney had begun his opening address, one of the jurors indicated to the court his reluctance to continue by reason of his newly-discovered relationship to one of the defendants. Upon inquiry, counsel for the defense stated he neither waived nor committed himself at that time with regard to the juror's revelation. However, when the prosecuting attorney, by court instruction, proceeded with his opening statement, counsel for the defense objected that the defendant could not have a fair and impartial trial. The court then, upon the prosecuting attorney's motion and over the defense objection, allowed the withdrawal of the submission of the cause "for the sole . . . purpose of determining the qualifications of the said juror to serve."<sup>2</sup> The juror was then found to be satisfactory to the prosecuting attorney, although no questions were asked of him by either party, and the jury was again sworn. Defendant thereupon filed an affirmative plea of double jeopardy, to which the prosecution filed a reply. The trial proceeded, the jury returned a verdict of guilty, and judgment being entered thereupon, the defendant appealed to the Supreme Court. That court, one judge dissenting, reversed the judgment with instruction to sustain the plea and discharge the defendant from further prosecution. It held that jeopardy attached when the jury was impaneled and sworn,<sup>3</sup> so that if, thereafter, the jury was discharged without the defendant's consent and in the absence of legal necessity for so doing, the defendant could not again be placed in jeopardy for the same offence.<sup>4</sup> That result was said to be dictated by the fact that the submission had been withdrawn without the defendant's consent and without legal necessity, for the juror in question was not further examined but was immediately re-accepted without other questioning.

The majority opinion proceeded upon the theory that it was too late, after the jury had been accepted and sworn to try the cause, to examine the jurors further as to their competency, or to peremptorily challenge any of them, unless a motion to set aside the submission was first interposed.<sup>5</sup> As a cause is to be submitted to a jury as a whole, it would obviously be necessary to set the submission aside before re-ex-

<sup>2</sup> — Ind. — at —, 102 N. E. (2d) 225 at 227.

<sup>3</sup> *People v. Watson*, 394 Ill. 177, 68 N. E. (2d) 265 (1946), cert. den. 329 U. S. 769, 67 S. Ct. 130, 91 L. Ed. 662 (1946); *Armentrout v. State*, 214 Ind. 273, 15 N. E. (2d) 363 (1938). In general, see 22 C. J. S., Criminal Law, § 241, p. 375.

<sup>4</sup> The general rule, as stated in 22 C. J. S., Criminal Law, § 258, p. 394, is that ". . . if the jury are discharged without accused's consent for a reason legally insufficient and without an absolute necessity for it, the discharge is equivalent to an acquittal, and may be pleaded as a bar to a subsequent indictment." See also *People v. Simos*, 345 Ill. 226, 178 N. E. 188 (1931).

<sup>5</sup> *Kurtz v. State*, 145 Ind. 119, 42 N. E. 1102 (1896).

aming any juror as to his qualifications in order that the jury would be in the same condition it was before being sworn to serve as a jury. The defendant's original objection was, therefore, improper and his failure to request a withdrawal of the submission might well have operated to waive his objection.<sup>6</sup> When it appeared, however, that there was no legal necessity for the discharge of the jury and the discharge was produced over his specific objection,<sup>7</sup> the court reasoned that the defendant had been exposed to jeopardy before the submission was withdrawn, hence was entitled to the benefit of his plea.

In considering any case wherein a jury has been impaneled and sworn and a juror is thereafter withdrawn and another substituted,<sup>8</sup> two classes of cases may be immediately eliminated; those where the incompetence of the juror is such as to render the verdict a nullity,<sup>9</sup> and those cases where, by legislative fiat, the court is allowed to substitute a juror without reference to a withdrawal of the submission of the cause,<sup>10</sup> or where it has been provided that challenges, both for cause and peremptory, may be taken after the jury has been impaneled and sworn.<sup>11</sup>

An investigation of the instant problem discloses that the only extensive treatment thereof has been made by the Supreme Court of Indiana.

<sup>6</sup> This would undoubtedly seem to be the rule in Indiana, for failure to use due diligence in urging objections to the competency of a juror, as well as failure of the complaining party to avail himself of such objections at the proper time, after they have come to his knowledge, would create an implied waiver of the error: *Adams v. State*, 99 Ind. 244 (1884); *Maden v. Emmons*, 83 Ind. 331 (1882); *Kingen v. State*, 46 Ind. 132 (1874). But see *Tatum v. State*, 206 Ga. 171, 56 S. E. (2d) 518 (1949), and *Guykowski v. People*, 2 Ill. 476 (1838). The better rule would seem to be that a failure to use due diligence in ascertaining a juror's incompetency, while interrogating him on his *voir dire*, would constitute a waiver or estoppel as to such incompetency, except where the incompetency of the juror would be such as to render the verdict reversible on review: *Stone v. People*, 3 Ill. 326 (1840). Ill. Rev. Stat. 1951, Vol. 1, Ch. 78, § 2, specifies the qualifications for jury service in Illinois.

<sup>7</sup> In *Lovato v. New Mexico*, 242 U. S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916), the Supreme Court of the United States, on an analogous situation, found no violation of due process but only an irregularity brought about by an overzealous regard for the defendant's constitutional rights.

<sup>8</sup> In jurisdictions providing for the use of alternate jurors, the problem is not apt to arise: *People v. Badenthal*, 8 Cal. App. (2d) 404, 48 P. (2d) 82 (1935); *State v. Henderson*, 182 Ore. 147, 184 P. (2d) 393 (1947), rehearing denied 182 Ore. 147, 186 P. (2d) 519 (1947).

<sup>9</sup> The effect of the procedure upon the constitution of the jury, as followed in the trial court, is not determinative in these cases, since procedural error would be considered subservient to the effort of the trial judge to prevent a void verdict from being rendered, it being impossible for either party to waive the juror's incompetency: *Stone v. People*, 3 Ill. 326 (1840); *People v. Barker*, 60 Mich. 277, 27 N. E. 539 (1886); *Manning v. State*, 155 Tenn. 266, 292 S. W. 451 (1927).

<sup>10</sup> *State v. Hasledahl*, 2 N. D. 521, 52 N. W. 315 (1892); *State v. Davis*, 31 W. Va. 390, 7 S. E. 24 (1888).

<sup>11</sup> *Nevada v. Pritchard*, 16 Nev. 101 (1881).

That court, in the cases of *Kurtz v. State*<sup>12</sup> and *Gillespie v. State*,<sup>13</sup> had occasion to lay the foundation for the decision in the instant case. The first of these cases established the rule that it would first be necessary to set aside the submission before further questioning a juror as to his competency. The second merely applied the reasoning so expounded, ruling that the discharge of a juror, upon the peremptory challenge of the prosecuting attorney following a withdrawal of the submission, was such an implied admission that the juror was competent that there could have been no legal necessity for his removal.<sup>14</sup> The Indiana doctrine, then, appears to be that after the jury is impaneled and sworn, a juror whose competency then becomes suspect cannot be interrogated on this subject unless a motion to set aside the submission is first interposed and allowed. If such a motion is granted, however, it is allowed at the peril of the prosecution for, if no legal necessity such as would justify the removal of the juror is thereafter shown, the withdrawal of the submission is the equivalent of an acquittal.<sup>15</sup> This, at first blush, may seem to be logical but the propriety of that view is extremely questionable, for the trial judge is faced with what is, in effect, an almost insurmountable difficulty.

Cases from other jurisdictions are substantially in accord with the reasoning of the Indiana court as to what constitutes legal necessity authorizing the withdrawal and substitution of a juror, but there the similarity of reasoning ceases. In *Deberry v. State*,<sup>16</sup> the Supreme Court of Tennessee, in commenting upon the substitution of a juror, said that the discharge of a juror<sup>17</sup> does not break up the entire panel, but that the other jurors remain a part thereof and are not again subject to challenge nor are they to be resworn. The Supreme Court of Louisiana, in *State v. Duvall*,<sup>18</sup> in sustaining the trial court's action in overruling the defendant's motion to reswear the original eleven jurors after a juror had been substituted, said that ". . . the motion necessarily implied an acceptance of the eleven jurors, and we agree . . . that the reswearing of said jurors would have been idle and useless ceremony."<sup>19</sup> The Arkansas

<sup>12</sup> 145 Ind. 119, 42 N. E. 1102 (1896).

<sup>13</sup> 168 Ind. 298, 80 N. E. 829 (1907).

<sup>14</sup> The reasoning evidently proceeded upon the theory that a peremptory challenge would not have been necessary had the prosecuting attorney been able to show legal cause for removal.

<sup>15</sup> The reasoning, somewhat doubtfully, presupposes that withdrawal of the submission amounts to a discharge of the jury. No other reported case, however, has expressly so held.

<sup>16</sup> 99 Tenn. 207, 42 S. W. 31 (1897).

<sup>17</sup> A plea of double jeopardy has been held good in similar situations: *Tomason v. State*, 112 Tenn. 596, 79 S. W. 802 (1903); *Ward v. State*, 20 Tenn. (1 Humph.) 253 (1839). See also *O'Brian v. Commonwealth*, 72 Ky. (9 Bush) 333 (1872).

<sup>18</sup> 135 La. 710, 65 So. 904 (1914).

<sup>19</sup> 135 La. 710 at 728, 65 So. 904 at 911.

case of *Martin v. State*<sup>20</sup> seems to be in accord with the last mentioned cases for the prosecution was there allowed to challenge a juror for cause,<sup>21</sup> after the jury had been impaneled and sworn, and another juror was then substituted.

One of two possible solutions to the problem may be drawn from these cases: either the substitution of the juror was done without the withdrawal from the jury of the submission of the cause, or the submission was withdrawn but it did not operate to effect a discharge of the jury as a whole. If the former is correct, the problem of substitution is substantially minimized. The court will then merely judicially ascertain,<sup>22</sup> without interference with the constitution of the jury, whether or not legal necessity for discharge of the juror exists and, if it is found to exist, the juror will merely be removed and another substituted, only the substitute juror then being sworn.<sup>23</sup> The latter alternative would seem to be more in accord with sound legalistic reasoning, and represents the course which probably ought to be adopted, for the cause was submitted to the jury as a whole, hence should be withdrawn from it before further re-examination of the juror.<sup>24</sup> The mere fact of the withdrawal of the submission of the cause should not, however, be deemed to represent a discharge of the jury, except in those cases where the withdrawal occurs in the absence of legal necessity. Since the discharge of the jury is normally considered a breakdown of its body, impeaching the organized identity thereof,<sup>25</sup> it would seem that the events which transpired in the instant case did not constitute a discharge of the jury. In fact, the defendant was tried by the identical jurors whom he had voluntarily accepted and who had been sworn to try the case; the organized identity of that body was not impeached,<sup>26</sup> there was not even a separation. At most, an irregularity occurred,<sup>27</sup> which was

<sup>20</sup> 163 Ark. 103, 259 S. W. 6 (1924).

<sup>21</sup> This procedure, however, represents an anomalous situation since, in the absence of a statute to the contrary, the character of juror can scarcely be said to attach while the right to challenge remains. *State v. Hasledahl*, 2 N. D. 521, 52 N. W. 315 (1892); *Nevada v. Pritchard*, 16 Nev. 101 (1881).

<sup>22</sup> That the discharge of a juror and substitution of another may not be done upon the *ex parte* order of the court without a judicial hearing at which defendant and his counsel are present, see *Upchurch v. State*, 36 Tex. Cr. Rep. 624, 38 S. W. 206 (1896).

<sup>23</sup> The converse would obviously be that, if the discharge of the juror was not from legal necessity, a breakdown of the jury would have occurred, equivalent to an acquittal.

<sup>24</sup> *Kurtz v. State*, 145 Ind. 119, 42 N. E. 1102 (1896).

<sup>25</sup> *Lewis v. State*, 121 Ala. 1, 25 So. 1017 (1899).

<sup>26</sup> In *Lewis v. State*, 121 Ala. 1, 25 So. 1017 (1899), after the jury was impaneled and sworn, the court told one juror to stand aside but afterwards ordered him to resume his place in the box. Held: no double jeopardy, but at most an unprejudicial irregularity.

<sup>27</sup> *Lovato v. New Mexico*, 242 U. S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916).

brought about by an error which did not prejudice the defendant in the slightest. It would seem, then, that the plea of double jeopardy should have been rejected.

Keeping within the bounds of established legal reasoning, yet with a view to solving a practical problem which could be common to any trial court, and without desiring to violate the defendant's constitutional right to be placed but once in jeopardy,<sup>28</sup> the solution would seem to be that if, after the jury is impaneled and sworn, there arises some question as to the competency or qualifications of a juror, a preliminary hearing should be held by the court to determine if legal cause exists for the removal of the juror. If such legal cause is found, the court should entertain a motion, if such be made, or should, upon its own motion, withdraw the submission of the cause from the jury, with a view to permitting a challenge of the juror on his renewed *voir dire* examination. If, upon the granting of the motion to withdraw the submission, a challenge is not forthcoming from either party, the court should, in order to prevent a re-impaneling and re-swearing of the same juror, discharge the juror and substitute another in his stead on the court's own motion.<sup>29</sup> In that way, it would be possible to obviate any claim that there was no legal necessity for setting the submission aside. That method would also prevent possible recourse to a plea of double jeopardy for legal cause for the nullification of the first purported trial would then exist.

R. K. HOFFMAN

DIVORCE—ALIMONY, ALLOWANCES AND DISPOSITION OF PROPERTY—WHETHER OR NOT THE ANNULMENT OF A SECOND MARRIAGE OPERATES TO REVIVE AN EARLIER OBLIGATION TO PAY ALIMONY—Litigation in the case entitled *Sutton v. Leib*<sup>1</sup> provided the federal judiciary with an opportunity to determine several important legal questions bearing on the effect to be given to a remarriage and the subsequent annulment thereof on a prior decree directing the payment of alimony. Plaintiff and defendant therein had been lawfully married in Illinois in 1925 but had been divorced in Illinois, in 1939, under a decree which provided for the payment of alimony in monthly installments, to plaintiff by defendant, for "so long as plaintiff shall remain unmarried." Subsequent to the divorce, plaintiff established a residence in New York but, in 1944, had married one Henzel while in Nevada. That marriage occurred on the same day that Henzel

<sup>28</sup> See, for example, Ill. Const. 1870, Art. II, § 10.

<sup>29</sup> 50 C. J. S., Juries, § 249, pp. 1006-7.

<sup>1</sup> — U. S. —, 72 S. Ct. 398, 96 L. Ed. (adv.) 352 (1952), reversing 188 F. (2d) 766 (1951), which had affirmed 91 F. Supp. 937 (1950), but on other grounds. Frankfurter, J., wrote a concurring opinion.

had been awarded an uncontested divorce in the last-mentioned state. Henzel and the plaintiff immediately returned to New York and the defendant, plaintiff's first husband, upon learning of the marriage, ceased making payments under the alimony decree. Shortly after plaintiff and Henzel had returned to New York, Henzel's first wife filed a suit against him for separate maintenance and charged that the Nevada divorce he had obtained was null and void. Plaintiff thereupon promptly left Henzel and instituted her annulment action on the ground that, as Henzel's first marriage had remained valid in New York, her marriage to him was void *ab initio*. The New York court, in due time, treating the Nevada divorce as invalid, granted an annulment of the Nevada marriage of plaintiff and Henzel. Plaintiff then brought action in a federal district court located in Illinois, relying on diversity of citizenship, to recover the allegedly accrued payments of alimony for the period from the date when defendant ceased making regular payments to a date in 1947 when plaintiff had validly married still another person.

The trial court entered a summary judgment for defendant on the basis of a purported settlement and release.<sup>2</sup> On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the result but upon the ground that the validity of the Nevada remarriage turned on the validity, in Nevada, of the antecedent Nevada divorce which Henzel had obtained from his New York wife. It assumed that, in the absence of direct attack thereon, the Nevada decree was valid and binding in the state where it was rendered,<sup>3</sup> hence required recognition of the subsequent marriage under the established rule that a marriage is to be deemed valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place have been complied with.<sup>4</sup> On certiorari, the United States Supreme Court reversed on the basis that the lower courts had failed to accord the proper degree of full faith and credit to the New York annulment decree. It remanded the case so as to give the lower federal court an opportunity to determine the state of the Illinois law as to the effect to be given to an annulment of a purported second marriage upon an earlier decree providing for the payment of alimony as long as the alimony recipient remained unmarried. It is presumed that the case is, therefore, still pending to await a determination of that issue.

The problem so presented should be of interest not only in Illinois

<sup>2</sup> See 91 F. Supp. 937 (1950). The trial court recognized the possibility of a full faith and credit problem relating to the effect to be given to the Nevada divorce and the New York annulment, but did not deem it necessary to decide the question.

<sup>3</sup> Note, in particular, 188 F. (2d) 766 at 768.

<sup>4</sup> Restatement, Conflict of Laws, § 121.



but also in other states which have, by statute,<sup>5</sup> incorporated the tenor of the instant decree regarding cessation of the obligation to pay alimony upon remarriage into all divorce decrees, at least by implication if not by express language.<sup>6</sup> It would seem to be clear that, in any decree pronounced subsequent to the enactment of such a statute and where there is no question of the validity of the remarriage, the alimony obligation ceases with the remarriage. In fact, Illinois courts have held it to be mandatory that alimony should cease,<sup>7</sup> even though the parties may have contracted otherwise,<sup>8</sup> for the local statute has been said to be no more than a codification of prior cases on the subject.<sup>9</sup> Assuming such to be the case, it would appear that a solution to the problem of the effect to be given to an annulment of a later marriage ought also to be found in prior cases, if any such exist, on the theory that they, too, have been codified into statutory form.

The precise question appears to have been presented to the Illinois Appellate Court for the First District in the case of *Lehmann v. Lehmann*.<sup>10</sup> In that case, the parties had been divorced in 1915 under an Illinois decree providing that, in the event that plaintiff should remarry, payments of alimony for her support should cease. Three months later, plaintiff contracted a marriage with one Quintard in New Jersey. She cohabited with Quintard for a period of about fifteen months in New York and in Maine and then returned to Illinois where she sued to annul her marriage to Quintard on the ground that it had been contracted in violation of an Illinois statute which then forbade remarriage within one year following a divorce.<sup>11</sup> The marriage was duly annulled by the Illinois court. Lehmann, upon learning of the remarriage, had ceased making alimony payments to plaintiff in the belief that her remarriage had brought an end to his obligation. Following the annulment, plaintiff sued to force Lehmann to pay her the regular alimony payments called for by the

<sup>5</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 19, for example, directs that a party shall not be entitled to alimony and maintenance after remarriage. The statute was not enacted until after the first divorce decree in the Sutton case: Laws 1933, p. 490. Comparable statutes may be found in Deering, Cal. Civ. Code 1949, § 139; Colo. Stat. Ann., Ch. 56, § 8; Nev. Comp. Laws 1939, § 9463; New Jersey Stat. Ann., Tit. 2:50—38, and Thompson, Cons. Laws N. Y., Civil Practice Act, § 1159.

<sup>6</sup> *Adler v. Adler*, 373 Ill. 361, 26 N. E. (2d) 504 (1940), cert. den. 311 U. S. 670, 61 S. Ct. 29, 85 L. Ed. 430 (1941).

<sup>7</sup> *Banck v. Banck*, 322 Ill. App. 369, 54 N. E. (2d) 577 (1944).

<sup>8</sup> *Miller v. Miller*, 317 Ill. App. 447, 46 N. E. (2d) 102 (1943).

<sup>9</sup> *Banck v. Banck*, 322 Ill. App. 369 at 376, 54 N. E. (2d) 577 at 581.

<sup>10</sup> 225 Ill. App. 513 (1922).

<sup>11</sup> Laws 1905, p. 194, repealed by Laws 1923, p. 327, provided in substance that in every case in which a divorce had been granted neither party should marry again within one year from the time when the decree was granted, and that if either of the parties did remarry within such one-year period, such marriage should "be held absolutely void." See note to Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 2.

divorce decree. The trial court found that while the Quintard ceremony may have been valid in New Jersey it was clearly void in Illinois, was actually no marriage, that petitioner had not remarried within the meaning of the terms used in the divorce decree, and that she had not forfeited her right to alimony payments. The Appellate Court, admitting that plaintiff's marriage would not have been valid under Illinois law, treated the marriage as valid in New Jersey,<sup>12</sup> as well as valid in New York and Maine where plaintiff had resided with Quintard, and was a remarriage as contemplated by the words of the divorce decree. It noted that, if plaintiff were to be allowed to recover alimony for the period she had cohabited with Quintard, she could have continued to so cohabit with him while being also entitled to receive the regular periodic alimony payments under the decree. In that regard, it quoted from the Illinois case of *Stillman v. Stillman*,<sup>13</sup> where it had been said that it was "unreasonable that she should have the equivalent of an obligation of support by way of alimony from a former husband, and an obligation from a present husband for an adequate support at the same time." According to that court, it was "her privilege to abandon the provision the decree of the court made for her support under the sanctions of the law, for another provision for maintenance which she would obtain by a second marriage." When she had done so, however, the law would "require her to abide by her election."<sup>14</sup> The law of Illinois, at that time, seemed to be established on the point that an annulment of a remarriage would not operate to revive the earlier alimony obligation.

Some seven years later, the New York Court of Appeals, in the case of *Schleicher v. Schleicher*,<sup>15</sup> dealt with much the same type of problem. The parties there had been married in 1908, separated in 1923, and had been divorced under a Nevada proceeding in 1924. The separation agreement had provided that the husband would pay a stated sum to his wife for her support and maintenance until she remarried. She did, in 1924, marry one Hannum, but this later marriage was annulled in New York, in 1927, by reason of Hannum's insanity. Here, also, the former husband had stopped making the stipulated payments of support money, a form of alimony, upon his former wife's remarriage. The plaintiff, following the annulment, contended that her right to payment had been revived when the second marriage was declared void *ab initio*. The court so held, although it divided over the point of the extent of the former husband's

<sup>12</sup> The provisions of the Uniform Marriage Evasion Act, Ill. Rev. Stat. 1951, Vol. 1, Ch. 89, § 19, appeared to have been inapplicable.

<sup>13</sup> 99 Ill. 196 (1881).

<sup>14</sup> 99 Ill. 196 at 202.

<sup>15</sup> 251 N. Y. 366, 167 N. E. 501 (1929). Kellogg, J., wrote a concurring opinion, concurred in by O'Brien, J.

obligation. Judge Cardozo, writing for the majority, indicated that the particular marriage was voidable, not void, in its inception but that the annulment, when decreed, put an end to the marriage from the beginning. Nevertheless, the majority felt that while the plaintiff should be allowed to recover support for the period after the marriage had been annulled, nothing should be granted for the period during which she had been supported by her second husband. Principal reliance was placed on two English cases.<sup>16</sup> It was the opinion of the minority that since the marriage was void from the beginning, under the doctrine of relation back, classed by the majority as an inapplicable legal fiction, the plaintiff should be entitled to recover for the entire period during which her first husband had failed to pay.

Except for these two cases, there would appear to be nothing in the American reports on the particular question, for the recent Louisiana case of *Keeney v. Keeney*,<sup>17</sup> based on a similar fact question, turns on the fact that, in that state, alimony is considered more in the nature of a pension than a perpetuation of the husband's duty to support his former wife, hence is to be deemed cut off even though the remarriage should be later annulled. Some uncertainty may have been engendered in the law of Illinois, however, by the later Illinois case of *People ex rel. Byrnes v. Retirement Board*,<sup>18</sup> also decided by the Appellate Court for the First District, as it seems to have adopted the New York rule. The case arose when a fireman's widow applied to the retirement board to be reinstated on the pension roll following the annulment of her second marriage. The Appellate Court, approving views expressed in the Schleicher case, decided that the annulment put an end to the remarriage from the beginning, rather than from the time of its dissolution, as would be the case in the event of a divorce. Finding that the remarriage had been effaced as if it had never been, the court ordered the widow restored to the pension roll "on the footing of its nullity,"<sup>19</sup> but declared that since this was a pension, it had no authority to direct the payment of the pension for the period of time during which the widow had been living with, and had been supported by, her second husband.

It is worthy of note that the court treated the Byrnes case as being one of first impression, for it appears to have approved a contrary foreign decision without knowledge of the fact that there might have been a prior

<sup>16</sup> *Matter of Wombell's Settlement*, [1922] L. R. 2 Ch. 298, and *In re Garnett*, [1905] L. J. 74 Ch. Div. 570.

<sup>17</sup> 211 La. 585, 30 So. 549 (1947).

<sup>18</sup> 272 Ill. App. 59 (1933).

<sup>19</sup> 272 Ill. App. 59 at 67.

Illinois case in point.<sup>20</sup> It might, however, be said that the Byrnes case, approving the New York view, is not really controlling on the point here under consideration as it deals with a pension question. If so, anything there decided would be dicta for the purpose of the instant problem, leaving the Lehmann case, never specifically overruled, to stand as the current Illinois view as to alimony matters. Technical distinctions do exist between these two Illinois cases for, in the first, the court ruled on the effect to be given to an annulment of a remarriage in relation to the obligation to pay alimony, a substitute for the husband's legally imposed obligation to support his former wife, while in the second case it passed upon the effect to be given a similar annulment as it related to the granting of a pension to the widow of a civil servant. When it is remembered that such a pension is a "bounty of the government, which it has the right to give, withhold, distribute, or recall at its discretion,"<sup>21</sup> the basis for distinction is made more apparent.

Even if no distinction existed, it could be said that the Byrnes case should not be followed for it erroneously rests on a decision which itself is based on error. Judge Cardozo, in the Schleicher case, had expressed the opinion that his views were justified by cases in which bequests of income were to be paid until remarriage. He referred to the English cases of *Matter of Wombell's Settlement*<sup>22</sup> and *In re Garnett*.<sup>23</sup> Again, an examination of these two cases would reveal that they are not authority for the position taken. They were, rather, cases in which it was decided that if a father should make a settlement of a sum of money upon his son, or upon his daughter's intended spouse, to be delivered upon the celebration of the marriage, such settlement could be recovered in the event the marriage should subsequently be annulled. The obvious failure of consideration for such a settlement would justify that result, but the instant problem involves no elements of contractual consideration nor the failure thereof.

On the basis of applicable case law alone, then, it would appear that the Illinois Appellate Court decision in the Lehmann case should control the rights of the parties in the Sutton case. If a new, and authoritative, Illinois decision on the point should be necessary, in preference to having

<sup>20</sup> Examination of the brief filed by counsel for the retirement board reveals that the case of *Lehman v. Lehman*, 225 Ill. App. 513 (1922), was not cited, nor was the theory of that case explored. Counsel relied principally on the claim that the right to be restored to the pension rolls had been taken away by statute when the widow remarried and that there was nothing in the statute to authorize a restoration to the pension rolls.

<sup>21</sup> See Black, Law Dict., 4th Ed., citing *Pecoy v. City of Chicago*, 265 Ill. 78, 106 N. E. 435 (1914).

<sup>22</sup> [1922] L. R. 2 Ch. 298.

<sup>23</sup> [1905] L. J. 74 Ch. Div. 570.

the state of the Illinois law determined by a federal court, a simple method is available to that end.<sup>24</sup> It would seem, however, that, as stated in the Stillman case, the plaintiff had the "privilege to abandon the provision the decree of the court made for her support under the sanctions of the law for another provision for maintenance which she would obtain by a second marriage."<sup>25</sup> Having exercised the privilege, she should be required to abide by her election.

The decision of the Supreme Court, however, appears to have opened the door to the creation of still further ambiguities in law. It is well known that "migratory" divorce has proved to be a plague to the courts. There is now added a threatened plague stemming from the "migratory" annulment. If jurisdiction to annul a marriage were limited to the state where the marriage was celebrated, only the courts of one state would be concerned with the problem and, until annulment had occurred there, other courts would be free to act on the basis of the record. It must be admitted that courts have, without giving too much thought to the matter, directly or inferentially, recognized a jurisdiction in the court of domicile to annul a marriage celebrated elsewhere, treating the question as being identical with that involved in a divorce proceeding,<sup>26</sup> but to be dealt with according to the law of the forum rather than by the *lex loci contractus*.<sup>27</sup> There has, however, been a respectable dissent on the ground that the analogy is not sound.<sup>28</sup>

Annulment, like divorce, is designed to operate on a status, hence is a proceeding *in rem* and would require that the court should have jurisdiction over the res. It is conceivable that an aggrieved spouse could, by change of domicile, move the status of marriage, an admittedly valid and

<sup>24</sup> Justice Frankfurter, in his concurring opinion in the instant case, offered the thought that the Court of Appeals should hold the case in abeyance until the parties requested a declaratory judgment from the Illinois Supreme Court. A second suggested method would be to dismiss the case on the basis that the necessary jurisdictional amount is lacking. Even under the view most favorable to the plaintiff, she would be entitled to back alimony only from September, 1947, the date of the New York annulment, to November, 1947, the date of her marriage to Sutton. The amount thereof would be inadequate in a diversity of citizenship case: *Howard v. Jennings*, 141 F. (2d) 193 (1944). Suit could then be left to state court action.

<sup>25</sup> 99 Ill. 196 at 202.

<sup>26</sup> See annotation in 128 A. L. R. at 64-5, and *Lyon v. Lyon*, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996 (1907); *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81 (1882), writ of error dismissed 107 U. S. 319, 27 L. Ed. 499, 2 S. Ct. 312 (1883).

<sup>27</sup> *Anonymous v. Anonymous*, — Del. —, 85 A. (2d) 706 (1952).

<sup>28</sup> Goodrich, "Jurisdiction to Annul a Marriage," 32 Harv. L. Rev. 806 (1919), contains an excellent theoretical treatment of the question. See also Dodd, "Annulment of Marriage," 23 Ill. L. Rev. 75 (1928). Walker, J., in his dissent in *Roth v. Roth*, 104 Ill. 35 (1882), at pp. 49-50, indicated that a foreign court would lack the power "to construe and give authoritative judgment against the validity of contracts made under our laws" and suggested that an Illinois court would "not be bound by the decree of nullity."

existing thing in law, into another state for the purpose of bringing that status before a court sitting there in order to secure its destruction by divorce. It is, likewise, theoretically possible to accomplish the same thing with respect to a voidable marriage for purpose of annulment inasmuch as it could be said that, until annulment has been granted, a "thing" exists, even though in imperfect fashion. Where, however, the charge is made that the purported marriage is void, and has been so from the beginning, one might well ask what "thing" there is to be carried across state lines into the adjoining jurisdiction to be there dealt with? Actually, the only "thing" in existence, the only "thing" to be destroyed, is a purported public record of a marriage and that is to be found at the place of celebration and there only. By analogy to a suit to nullify the effect of a forged but recorded deed to land, the annulment proceeding, in the last mentioned instances at least, should be deemed local rather than transitory in character.<sup>29</sup>

To compound the confusion, the United States Supreme Court has now declared that when the domiciliary state, possessing no more than control over the parties, has pronounced a decree of annulment relating to an allegedly void marriage occurring in a sister state, which marriage might well have been declared valid at the place of celebration had the annulment proceeding been there instituted, other states must give full faith and credit to the annulment decree. If bound to recognize the uncanceled public record of the one state, yet forced to apply the annulment decree of the other, a third state would stand in much the same position as the proverbial innocent bystander, to-wit: sure to get hurt but unable to do much about it.

A. GELLER

RELEASE—CONSTRUCTION AND OPERATION—WHETHER OR NOT RELEASE, GIVEN TO ONE TORT FEASOR COVERING STATUTORY LIABILITY FOR WRONGFUL DEATH, OPERATES TO RELEASE ANOTHER FROM CAUSE OF ACTION ARISING FROM VIOLATION OF "DRAM SHOP" STATUTE—The Appellate Court for the Fourth District, in the case of *McClure v. Lence*,<sup>1</sup> was faced with the problem as to whether or not a release given to one for a cause of action resting on the Wrongful Death Act<sup>2</sup> would operate to bar a subsequent

<sup>29</sup> In *O'Brien v. Eustice*, 298 Ill. App. 510, 19 N. E. (2d) 137 (1939), it was indicated that it would be necessary to add the proper public official as a party defendant if the purpose of the annulment proceeding was to secure nullification of the public record of the purported marriage. The implication of that holding would be that, if such public official were the official of another state, it would be necessary to begin suit at the place of his official residence, otherwise it would be impossible to obtain jurisdiction over him.

<sup>1</sup> 345 Ill. App. 158, 102 N. E. (2d) 546 (1951).

<sup>2</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 1 et seq.

suit, for the same injury, against another based on the Illinois Liquor Control Act.<sup>3</sup> The case was one in which several minors, patrons of the defendant's tavern, had allegedly there become intoxicated. After leaving the tavern, the car in which they rode, driven by one of the minors, became stalled on a railroad crossing, was struck by an approaching train, and three of the passengers were killed. The legal representatives of the deceased automobile passengers gave full and binding releases to the railroad in question and thereafter sued the tavern keeper for damages arising from a violation of the liquor control law.<sup>4</sup> The defendant, among other things, pleaded the releases given the railroad as a special defense,<sup>5</sup> but that defense, on motion, was stricken on the theory that the causes were distinct and arose under different statutes. Judgment was given in favor of the several plaintiffs after trial but, on appeal by defendant, the Appellate Court reversed and remanded the cause with a direction to overrule the motion to strike the special defense relating to the releases.

While the foundations for the proposition that a release given to one joint tortfeasor should operate to release the others are in some state of confusion,<sup>6</sup> the doctrine is, nevertheless, a practically unanimous one in the United States.<sup>7</sup> There is, however, much confusion over the problem of who should be treated as joint tortfeasors for this purpose and the conflict is apparent in the Illinois cases on the subject. The earliest and foundation case in this state would appear to be that of *Chapin v. Chicago & Eastern Illinois Railroad Company*.<sup>8</sup> Counsel for the plaintiff therein had contended that a release given to one of the parties did not bar action against the defendant as they were not joint tortfeasors. The court, holding for the defendant, stated: "Whether they were joint tortfeasors or not, we do not deem it important in the view we take of the case. It is enough if they were both liable for the same injury."<sup>9</sup> While the words quoted were probably dicta, since the plaintiff's injuries had been caused in a collision between two railroad trains and the two carriers would be joint tortfeasors under any construction given to the phrase "joint tortfeasors," at least one later Illinois case has followed the reasoning there expressed where the several causes, although arising at different periods

<sup>3</sup> Ibid., Ch. 43, § 94 et seq.

<sup>4</sup> Ibid., Ch. 43, § 135, provides for a civil remedy for damages caused by an intoxicated person.

<sup>5</sup> Ibid., Vol. 2, Ch. 110, § 167(4), lists a release as being one of the affirmative defenses there mentioned.

<sup>6</sup> See opinion of Rutledge, J., in *McKenna v. Austin*, 134 F. (2d) 659 (1943).

<sup>7</sup> *Welty v. Laurent*, 285 Ill. App. 13, 1 N. E. (2d) 577 (1936). See also annotation in 104 A. L. R. 847.

<sup>8</sup> 18 Ill. App. 47 (1885).

<sup>9</sup> 18 Ill. App. 47 at 50.

of time, were related and rested on common law principles of negligence so as to be within the classification of a "joint" tort.<sup>10</sup> The doctrine has also been applied by the Appellate Court for the Second District, in *Manthei v. Heimerdinger*,<sup>11</sup> to a case involving a release given to one for a cause resting on common law negligence producing personal injury but deemed to operate as a bar to a suit against a tavern keeper, based on a violation of the liquor control law, for conduct leading up to the injury. The court there cited the Chapin case in support of the idea that it is relatively unimportant whether the parties are technically joint tort feorsors so long as they are liable for the same indivisible injury arising out of a single accident.

Another line of Illinois cases, however, beginning with the decision in *Scharfenstein v. Forest City Knitting Company*,<sup>12</sup> would indicate that it is necessary, for the principle of release to operate, that the parties be, in fact, "joint" tort feorsors. The plaintiff there had released a railroad from its liability to him predicated on the Federal Employer's Liability Act and had thereafter sued a corporation which had negligently permitted its agents to pile dirt on the railroad tracks. The case may be weakened somewhat by the fact that the instrument was probably no more than a covenant not to sue, but the court did say that, even if it could be construed to be a release, the plaintiff's cause of action, resting on a distinct tort, would not be barred. That view has been followed in other cases, including one in which a covenant not to sue for wrongful death has been treated as inadequate to bar a suit based on the "Dram Shop" statute.<sup>13</sup> In those cases, the court has looked for, and found, a distinct basis for liability as to each of the parties involved.

Faced with these conflicting decisions, the Appellate Court in the instant case chose to follow the first of these views. As the Chapin case has never been overruled, and as those cases which seem to be contrary do not reject the theory thereof but ignore it, the result attained would seem

<sup>10</sup> In *Guth v. Vaughan*, 231 Ill. App. 143 (1923), for example, the plaintiff was injured in an automobile accident but the injuries were aggravated by the malpractice of a physician. A release given to the automobile driver was held to bar an action against the physician. The case of *Aiken v. Insull*, 122 F. (2d) 746 (1941), certiorari denied 315 U. S. 806, 62 S. Ct. 638, 86 L. Ed. 1205 (1942), states that the Illinois law is that tort feorsors are released if "they were both liable for the same injury." It cites *Chapin v. C. & E. I. R. R. Co.*, 18 Ill. App. 47 (1885), as authority.

<sup>11</sup> 332 Ill. App. 335, 75 N. E. (2d) 132 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 358.

<sup>12</sup> 253 Ill. App. 190 (1929).

<sup>13</sup> *Herberger v. Anderson Motor Service Co.*, 263 Ill. App. 403 (1932); *Hyba v. Horneman, Inc.*, 302 Ill. App. 143, 23 N. E. (2d) 564 (1939). The last mentioned case held that a covenant not to sue for a wrongful death did not bar a subsequent suit by the administrator based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 43, § 94 et seq. See also *Meyers v. Y. M. C. A. of Quincy, Illinois*, 316 Ill. App. 177, 44 N. E. (2d) 755 (1942).



to be the sounder one. If it is the purpose of the law of torts to assure no more than compensation to one who has been injured by the acts of others, then one who has received full compensation from one of the several wrongdoers, or who has entered into a contract from which it may be presumed that he has received full compensation, should have no right to further judicial action for the purpose of the law has been satisfied. The amount of recovery should not, ordinarily, be made to depend on the fortuitous circumstance that in one case the bases for the suit rest on different statutes and in the other on different common law theories of liability. The fact that a death has ensued should not, alone, be enough to change the outcome which would have been attained had the victim survived and given a release of his common law cause of action for personal injuries.<sup>14</sup> The same should be true as to a release given on a cause resting on the "Dram Shop" statute for, although the statute creates a separate and distinct right of action unknown to the common law,<sup>15</sup> the right of recovery rests on the fact of injury and not merely on the sale of liquor.

If the legislature had intended that the statute should serve to provide the basis for an additional recovery, even though full compensation has already been received from another whose acts concurred in producing the death or injury, it should have expressly so stated. In the absence of such a statement, a court should not presume that the statute derogates against the common law doctrine that a person should have but one recovery for a single injury.

W. J. MOORE

<sup>14</sup> *Holton v. Daley*, 106 Ill. 131 (1883); *Crane v. Chicago & Western Indiana R. R. Co.*, 233 Ill. 259, 84 N. E. 222 (1908). The reasoning of these cases appears to have been overlooked in *Hyba v. Horneman, Inc.*, 302 Ill. App. 143, 23 N. E. (2d) 564 (1939), where the two statutory claims grew out of the same wrongful act. It is true, however, that the case involved only a covenant not to sue, hence there could be no presumption of full satisfaction.

<sup>15</sup> *O'Connor v. Rathje*, 368 Ill. 83, 12 N. E. (2d) 878 (1937).